Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DAVID KEITH POGUE and DENISE POGUE,

Petitioners,

v.

OGLETHORPE POWER CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Eleventh Circuit erred by failing to apply this Court's decisions in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 589, 113 S. Ct. 2786 (1993) and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167 (1999) to exclude expert testimony offered by a defendant in a civil case where the defendant offered no basis in science or experience to support the expert's testimony and similar testimony offered by a plaintiff's expert would certainly have been excluded.

2. Whether the Court of Appeals for the Eleventh Circuit abused its discretion by fashioning a rule of law in this case that is inconsistent with its own prior decisions, decisions of other circuits, decisions of this Court and common sense, and ordering that its opinion not be published.

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Petitioners David and Denise Pogue, (hereinafter referred to as "Petitioners"), respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

This civil case was tried to a jury and judgment was entered for Respondent Oglethorpe Power Corporation, (hereinafter referred to as "Respondent"), on the jury's verdict on July 29, 1998.[1] On April 28, 2000, the Eleventh Circuit affirmed the judgment of the district court in an "unpublished" opinion, attached hereto as Appendix A. The district court's unpublished order denying Petitioners' pretrial motion to permit introduction of evidence of the "wrap-up" insurance program is attached hereto as Appendix B.

STATEMENT OF JURISDICTION

This Petition for a Writ of Certiorari is filed within ninety (90) days of the order denying Petitioners' petition for rehearing *en banc* (Appendix C) and thus is timely under Supreme Court Rule 13(1).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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1. Initially, summary judgment was granted by the district court to Respondent. On appeal, the Eleventh Circuit certified a question of law to the Georgia Supreme Court. Following the decision of the Georgia Supreme Court, the Eleventh Circuit reversed the district court and remanded the case for trial. These opinions are not relevant to this proceeding.

CONSTITUTIONAL PROVISION AND RULES INVOLVED

Article III, Section 1 of the United States Constitution provides in relevant part: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

Federal Rules of Evidence, Rule 401 (Definition of Relevant Evidence) provides:

> Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Federal Rules of Evidence, Rule 402 (Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible) provides:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Federal Rules of Evidence, Rule 403 (Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time) provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Federal Rules of Evidence, Rule 411 (Liability Insurance) provides:

> Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

Federal Rules of Evidence, Rule 702 (Testimony by Experts) provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

STATEMENT OF THE CASE

After David Pogue fell approximately forty-eight (48') feet through an unsecured opening in the floor of a construction project where he was working as a cement finisher and sustaining serious and disabling injuries, he and his wife (Petitioners) brought a negligence action against Oglethorpe Power Corporation, the owners of the project (Respondent). The district court had diversity jurisdiction over the case. There was little doubt that someone was negligent with respect to the unsecured opening. The key issue at trial was whether Respondent was the responsible party.

Prior to the commencement of the trial, Petitioners filed three motions *in limine*, two of which underlie this petition for writ of certiorari. Petitioners sought in one motion — relying on Fed. R. Evid. 403, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993), and *General Electric Co. v. Joiner*, 522 U.S. 136, 118 S. Ct. 512 (1997) — to exclude and/or limit evidence of a urine drug screen performed on David Pogue on June 5, 1992. **R6-78.** Petitioners sought in another motion "to introduce evidence of the existence, manner and nature of a "wrap-up" insurance program . . ." which governed safety responsibility on the construction project. **R5-71.**

A week before the trial was to start, the district court held a hearing on Petitioners' motion *in limine* to exclude and/or limit evidence of the urine drug screen administered David Pogue. The district court summarily denied the motion on the basis of *Ballou v. Henri Studios, Inc.*, 656 F.2d 1147, 99 F.R.D. 229 (5th Cir. 1981). **R10-32.** The previous day the district court had denied Petitioners' pretrial motion to permit introduction of evidence of the "wrap-up" insurance program. (Appendix B).

During the course of the trial, Petitioners sought on several occasions to have the district court revisit its ruling relative to evidence of the "wrap-up" insurance program, and on each occasion the district court again ruled against its relevance and admissibility. **R11-122-124; R14-730-738; R15-864-867.**

No evidence was presented during the trial that David Pogue used drugs on the day of the alleged incident or that he in any way appeared impaired. **R12-401-405, 409-412, 416; R16-972.** But, when he was taken to the hospital following his fall, a routine urine drug screen indicated that there were 25 nanograms of the metabolite delta-9-tetra-hydrocannabinol (THC) in David Pogue's system. **R15-911, 914-915.** Based on this test, Respondent sought during trial to suggest that David Pogue was under the influence of marijuana and thus contributorily negligent. The only basis for this suggestion was the result of a urine drug screen that was the subject of Petitioners' unsuccessful motion *in limine*.

In its case in-chief, Respondent called Deborah Burkhalter, a medical technologist at the hospital where David Pogue was taken for emergency treatment following the alleged incident. She testified that she personally ran the machine which performed the drug screen on David Pogue's urine, and that the machine recorded result was positive for THC, *e.g.* 25 nanograms per milliliter in the urine. However, she also testified on cross-examination as follows: she could not say whether the machine on which the test was run generated correct results; she did not know whether a key protocol for the test was followed; when asked how big a nanogram was, she said, " I have no idea"; she could not even say that she ran the test correctly; her protocol required

that the test results be identified as unconfirmed and she did not know what a confirmed test would be. **R15-913-915.**[2]

Respondent also called Horton McCurdy, Ph.D., an employee of the Georgia Bureau of Investigation Division of Forensic Sciences, who testified in this case as a paid representative of his own consulting firm. **R16-937-939.** Amazingly, he admitted during his direct examination that, even though he placed a high degree of reliability on a urine screen for medical purposes, "[for legal purposes], I would *not* rely on any one test to determine that a substance is positive." **R16-953.** In fact, he clearly stated that at the crime lab they never report any positive finding unless it is confirmed by at least two tests. **R16-953-954.** On recross-examination, Dr. McCurdy was asked: "There's no evidence of impairment in this case, is there, Doctor?" His answer was, **"Not to my knowledge." R16-972.**

Petitioners were compelled to address this highly inflammatory issue. They read the evidence deposition of Timothy Holt, M.D., the orthopedic surgeon who first treated David Pogue in the emergency room on the date of the alleged incident and later that day, performed surgery on him. Dr. Holt testified unequivocally that there was *no* indication in the history, medical notes or toxicological screen of David Pogue that he was under the influence of drugs, other than the *unconfirmed* results of the urine drug screen. Dr. Holt further testified that even an expert could not determine from a urine drug screen whether a person is under the influence of the identified substance.

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2. Dr. Woodford's uncontradicted testimony was that even the manufacturer of the urine drug screen administered David Pogue prescribed in its protocol that a positive test *must be confirmed.* **R12-405-406, 448.**

Petitioners also called an expert chemist, James Woodford, Ph.D. Dr. Woodford holds a patent on the confirmation test for marijuana detection, which relates specifically to the detection of THC in urine. **R12-382-383.** Dr. Woodford explained that the hospital which did the urine drug screen on David Pogue is not licensed to do "legal" drug screens, only drug screens for medical purposes. He described the test performed on David Pogue as an immunoassay test, which is designed to test for various compounds and substances like THC. He explicitly testified that chemists *cannot* and *should not* rely on urine drug screens as positive demonstration that substances are actually in urine and that such tests are "notoriously unreliable."[3] In the end, Dr. Woodford's testimony was that the urine drug screen administered to David Pogue was *not* accurate enough to support any judgment about the presence of marijuana let alone impairment.

In this case there was *no* witness to testify that 25 nanograms per milliliter in a urine test was considered by experts in any field to be evidence of impairment. There was *no* witness in this case to explain that there is any medical or scientific basis for concluding that trace elements of THC in a urine test would have any affect on a human being. The marijuana evidence failed to meet the required standard for admissibility mandated by this Court in *Daubert.*

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3. Dr. Woodford also explained that in 1992 the National Institute of Drug Abuse, in the Department of Health and Human Services, recommended that a urine screen have 100 nanograms per milliliter to be deemed a positive test and that at the time of trial the recommended minimum number was 50 nanograms per milliliter. **R12-407-408.** This testimony was *uncontradicted.*

The district court refused to examine any of the *Daubert* factors in denying Petitioners' motion to exclude the evidence. Even though Respondent's own expert testified that he would not rely on the urine screen test in a legal proceeding, the district court permitted the testimony described above.

In reviewing the district court's ruling, the Eleventh Circuit reasoned that "[w]hile the results [of the urine test] did not require the jury to find that Pogue was impaired at the time of his fall, the positive drug screen was some evidence from which the jury would have been entitled to infer that he was." Appendix A, at p. 7a. The court cited no evidence of any foundation to establish that the screen was reliable and that its results could be associated with impairment. The appellate court completely ignored *Daubert* and indicated no interest in the gatekeeping function, which the district court had clearly abrogated.

While permitting Respondent to offer clearly unreliable evidence on the clearly prejudicial use of marijuana, the district court added insult to injury by denying Petitioners the use of perhaps the most relevant evidence to demonstrate and prove to the jury that Respondent had failed to conduct proper and adequate safety inspections and had failed to enforce the requisite safety regulations and procedures at the worksite where David Pogue's fall occurred. **R1; R5-68, Attachment "C."**

From the outset of this case, Respondent's principal defense was that it was not responsible for safety, because safety responsibility under the contract for the construction project had been assigned to Power Plant Constructors (PPC), the general contractor for the project. **R14-702-705; 707-721.**

In order to rebut this defense, Petitioners proffered as evidence a "wrap-up" insurance program, which they contended clearly demonstrated that Respondent had exercised its power and rights under the contract to control safety.

In their motion *in limine* regarding the "wrap-up" program, Petitioners argued that the program was admissible to prove *inter alia* control of safety, responsibility for safety programs and inspections, and to rebut Respondent's witnesses who would testify that Respondent did not exercise control over David Pogue's employer, PPC. Thus, Petitioners' motion made clear that it did not seek to offer evidence of insurance on the issue of whether Respondent acted "negligently or otherwise wrongfully" as prohibited by Fed. R. Evid. 411. Instead, Petitioners sought to offer the evidence for purposes that Rule 411 expressly recognizes as proper.

The district court entered an order on July 13, 1998 denying Petitioners' motion *in limine* because "[o]wnership and control of the property on which the accident allegedly occurred is not an issue in this case," and "[b]oth parties stated to the Court in the Pre-Trial Conference of June 16, 1998, that [Respondent] would not deny ownership or control of the premises." The problem with the district court's reasoning is that Petitioners were offering the "wrap-up" program to prove control over safety and inspections and motivation for that control. These were hotly disputed matters and by excluding the "wrap-up" program, the district court denied Petitioners a fair opportunity to prove that as a result of the "wrap-up" program, Respondent undertook obligations that included exercising control over safety.

The district court's exclusion of the "wrap-up" program was especially prejudicial because Respondent relied so heavily upon Section 5-24, Paragraph A.2 of the contract between respondent and David Pogue's employer, which reads as follows:

> The Owner reserves the right, but assumes no duty, to establish and enforce site rules, and to change the same from time to time, for the protection of persons and property, with which the Contractor shall comply, and to review efficiency of all protective measures taken by the Contractor. Nevertheless, the exercise of or failure to exercise any or all of these duties and responsibilities under this Contract are the responsibility of the Contractor, and the Owner does not thereby assume, nor shall be considered to have assumed, any such duties or responsibilities of the Contractor. **R14-706, Defendant's Exhibit No. 1.**

Under the "wrap-up" program, Respondent provided for insurance coverage for all contractors on the project, both workmen's compensation insurance and liability insurance. This was done by Respondent to reduce the overall cost of the project. Respondent also retained responsibility for the first $250,000 of any damages. It was this financial motivation and responsibility that caused Respondent to hire safety inspectors, to set safety standards, and to enforce them. Notwithstanding the language of its contract with David Pogue's employer, Respondent retained responsibility for safety by exercising ultimate control over site safety. By excluding the "wrap-up" program, the district court left the jury with the mistaken impression that the contract

between Respondent and PPC had effectively shifted safety responsibilities away from Respondent when those responsibilities actually remained with Respondent under the "wrap-up" program. It is difficult to imagine more important evidence being excluded at this trial.

Respondent's response to Petitioners' motion *in limine* was that the "wrap-up" program should not be admitted because "their [sic] is no issue of control, ownership or responsibility for the safety program and the inspections." This statement was, of course, wrong, as the issue of control was the most important of the issues contested at trial. Even while arguing that the evidence of the "wrap-up" program was not admissible, Respondent represented that it "will agree to allow such evidence on the condition that [Respondent] is allowed to state during *voir dire* and opening statement, and to introduce evidence during trial of the fact and amount of payments to [David Pogue] under the 'wrap-up' insurance program in question." **R75-3.** Respondent made the strained argument that the rule of completeness found in F.R.Evid., Rule 106.[4]

The most egregious incident of unfairness arising from exclusion of the "wrap-up" program arose during the testimony of Dale Murphy, the project manager for Respondent when he was recalled as part of Respondent's case-in-chief. Mr. Murphy attempted to suggest that there were separate safety programs run by Respondent and PPC, David Pogue's employer, and that Respondent was only

4. As this Court recognized in *Old Chief v. United States*, 519 U.S. 172, 136 L. Ed. 2d 574, 117 S. Ct. 644 (1997), the case for admitting evidence improves when the proponent chooses less prejudicial alternatives to proving a point. *See also United States v. McVeigh*, 153 F.3d 1166 (10th Cir. 1998).

responsible for its employees and not for PPC's employees. Counsel for Petitioners asked a straightforward question to which Mr. Murphy gave an answer that he must have known to be false. The exchange was as follows:

> Q: Didn't you say in your memorandum that the safety, loss control program for the Rocky Mountain Project encompasses every person at the site, whether employed by Oglethorpe Power or any contractor or consultant? You wrote that, didn't you, sir?
>
> A: That's true, but that program includes our safety program, Power Plant Constructors safety program, Harza construct — Harza Engineering Company had a safety manual. Everybody that came on that project to do anything was required to pass — have insurance and to have a safety program, a quality program. **R14-729-730.** (emphasis in original).

Mr. Murphy well knew that the insurance, *i.e.*. the "wrap-up" program and safety programs, went hand-in-hand, and he also knew that what he said was false. The truth was that no contractor was responsible for insurance. That was the point of the "wrap-up" program. Immediately after Mr. Murphy uttered these words, counsel for Petitioners turned to the district court and said, " Your Honor, there's a matter that has been pending before your Honor since the outset of the case regarding the wrap-up, and I would like to approach the bench about the Oglethorpe matter." **R14-730.**

Again, Petitioners tried to persuade the district court to permit the use of the "wrap-up" program, this time to impeach false testimony. Again, the district court refused to admit it. As a result, Respondent was permitted to rely upon false testimony to create a false impression about insurance, and Petitioners were forbidden to present rebuttal evidence in the form of the "wrap-up" program or testimony relating to it.

The Eleventh Circuit upheld the district court by reasoning as follows: "[m]otivation and control of safety, however, are two entirely different things. While motivation to avoid financial liability may prompt one to undertake to guarantee safety, it is no proof at all that one, in fact, did undertake to do so." Appendix A, at p. 5a.

REASONS FOR GRANTING THE WRIT

I.

IT IS VITAL THAT THIS COURT GRANT REVIEW AND ESTABLISH THAT THE DISTRICT COURT'S GATEKEEPING FUNCTION IS TO BE APPLIED TO ALL EXPERT TESTIMONY OFFERED UNDER RULE 702 OF THE FEDERAL RULES OF EVIDENCE.

This Court established in *Daubert* and *Kumho Tire* that a district court must be a gatekeeper when a plaintiff offers expert testimony, and the defendant objects that it is unreliable or irrelevant. In this case, it was the defendant who offered expert testimony, but neither the district court nor the Eleventh Circuit felt obliged to apply *Daubert*. This is a violation not only of *Daubert*, but [also of] *Kumho Tire* where this Court made clear that gatekeeping is required of all experts.

There is little doubt that if the plaintiff in any civil case had offered expert testimony like that admitted in this case it would be error for a district court to admit it. Petitioners offer the following hypothetical case as an example: (1) a plaintiff brings a lawsuit against a defendant based upon a claim that the defendant's impairment from marijuana use was the proximate cause of an auto accident; (2) the only evidence the plaintiff has of impairment is that after the accident a test of the defendant's urine revealed that it had at least 25 nanograms per milliliter of marijuana; (3) the defendant moves under *Daubert* to exclude the urine test; (4) the defendant establishes that *no one* — no doctor, hospital, scientist, or other expert — contends that 25 nanograms per milliliter in urine establishes impairment; (5) the defendant establishes that *no one* — no doctor, hospital, scientist, or other expert — has any data to explain the effect of such marijuana traces in blood; (6) the defendant establishes that the manufacturer of the test specifically provided that it was not reliable enough to be used without a confirmatory test which had not been conducted; and (7) there was nothing in the defendant's behavior near the time of the accident to suggest impairment.

Petitioners respectfully submit that no trial judge should admit the plaintiff's evidence, for it would fail every part of the *Daubert* analysis. The evidence admitted for Respondent through the testimony of its expert in this case was exactly the same, and it should have been subjected to *Daubert* screening.

Thus, Petitioners respectfully request the Court grant the writ prayed for by this petition and hold that *Daubert* and *Kumho Tire* applies to all expert testimony permitted under Rule 702, plaintiff and defendant experts alike. Under this

Court's decision in *General Electric Co. v. Joiner*, 522 U.S. 136, 118 S. Ct. 512 (1997), it was an abuse of discretion for the district court to abandon its gatekeeper function and another abuse of discretion for the Eleventh Circuit for all intents and purposes to ignore the grounds asserted by Petitioners in their appeal and to fail to engage in the appropriate *Daubert-Kumho Tire* analysis. Other circuits have recognized that when a *Daubert* objection is made in a civil case by a plaintiff, the district court must perform a gatekeeping function. *See, e.g., Bryant v. City of Chicago*, 200 F.3d 1092, 1098-1099 (7th Cir. 2000) (upholding admission of expert testimony of the drafter of a promotional test; *Ruiz-Trioche v. Pepsi Cola of P.R. Bottling Co.*, 161 F.3d 77, 85 (1st Cir. 1998) (reversing judgment for plaintiff because district court improperly excluded defense expert pharmacologist).

II.

THIS PETITION SHOULD BE GRANTED BECAUSE THE ELEVENTH CIRCUIT APPLIED A RELEVANCE RULE THAT IS CLEARLY INCONSISTENT WITH ITS OWN DECISIONS AND THOSE OF OTHER CIRCUITS WITH RESPECT TO MOTIVE EVIDENCE AND, INSTEAD OF ACKNOWLEDGING THE ERROR OF ITS RULING, ORDERED ITS OPINION NOT TO BE PUBLISHED. IN DOING SO, THE ELEVENTH CIRCUIT DENIED PETITIONERS THE BENEFIT OF THE RULE OF LAW AND ABUSED ITS DISCRETION. THE "UNPUBLISHED" OPINION IN THIS CASE IS IN DIRECT CONFLICT WITH THE RECENT EIGHTH CIRCUIT OPINION IN *ANASTASOFF v. UNITED STATES*, NO. 99-3917EM, (AUGUST 22, 2000), 2000 U.S. APP. LEXIS 21179, 69 U.S.L.W. 1118-1119, WHICH HELD THE PORTION OF 8TH CIR. R. 28A(i) THAT DECLARES UNPUBLISHED OPINIONS ARE NOT PRECEDENT IS UNCONSTITUTIONAL UNDER U.S. CONST. ART. III. BECAUSE IT PURPORTS TO CONFER ON THE FEDERAL COURTS A POWER THAT GOES BEYOND THE "JUDICIAL."

Motive evidence is important in many civil and criminal cases. In a homicide case, for example, in which the defendant is charged with homicide, prosecutors may introduce evidence that the defendant was having an affair with the spouse of the victim to prove a motive for the killing. Or, a prosecutor might show that the victim was having an affair with the defendant's spouse to show motive. Motive evidence can be equally important in a civil case. *See, e.g., Aetna Casu. & Sur. Co. v. Gosdin*, 803 F.2d 1153, 1158 (11th Cir. 1986). In that case the Eleventh Circuit

reversed a judgment for the insurer in a dispute with its insured concerning the cause of a fire, but it upheld the introduction of motive evidence that the insured had been charged with burglary and needed money to mount a defense. It is clear that the Eleventh Circuit's decision in this case is inconsistent with its own prior approach to motive evidence — established in a published opinion for which the court was accountable by subsequent appellate review.[5] *See also Powell v. Merrimack Mut. Fire Ins. Co.*, 667 F.2d 26, 29-30 (11th Cir. 1982) (in civil arson case, upholding admission of evidence of lawsuit against policyholder where insurance company claimed that policyholder was in bad financial condition and policyholder did not admit existence of lawsuit).

It is also clear that the unpublished opinion in this case is inconsistent with this Court's analysis of motive in cases like *Wisconsin v. Mitchell*, 508 U.S. 476, 489, 113 S. Ct. 2194 (1993), where this Court recognized that motive evidence is powerful proof of conduct and a powerful way to explain a party's actions, even when the First Amendment is arguably implicated by motive evidence:

> The First Amendment, moreover, does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or

5. The problems with "unpublished" opinions and the way they may deny, as in this case, equal justice and the rule of law have been noted for many years. *See, e.g.*, Pamela Foa, Comment, *A Snake in the Path of the Law: The Seventh Circuit's Non-Publication Rule*, 39 U. Pitt. L. Rev. 309 (1977); James N. Gardner, *Ninth's Circuit's Unpublished Opinions: Denial of Equal Justice?*, 61 A.B.A. J. 1224 (1975); Daniel N. Hoffman, *Nonpublication of Federal Appellate Court Opinions*, 6 Just. Sys. J. 405 (1981); Herbert J. Stern, *The Enigma of Unpublished Opinions*, 64 A.B.A. J. 1245 (1978).

> intent. Evidence of a defendant's previous declarations or statements is commonly admitted in criminal trials subject to evidentiary rules dealing with relevancy, reliability, and the like. Nearly half a century ago, in *Haupt v. United States*, 330 U.S. 631, we rejected a contention similar to that advanced by Mitchell here. Haupt was tried for the offense of treason, which, as defined by the Constitution (Art. III, § 3), may depend very much on proof of motive. To prove that the acts in question were committed out of "adherence to the enemy" rather than "parental solicitude," *Id.*, at 641, the Government introduced evidence of conversations that had taken place long prior to the indictment, some of which consisted of statements showing Haupt's sympathy with Germany and Hitler and hostility towards the United States. We rejected Haupt's argument that this evidence was improperly admitted. While "[s]uch testimony is to be scrutinized with care to be certain the statements are not expressions of mere lawful and permissible difference of opinion with our own government or quite proper appreciation of the land of birth," we held that "these statements . . . clearly were admissible on the question of intent and adherence to the enemy." *Id.*, at 642.

In most cases, criminal or civil, the party against whom motive evidence is offered denies doing the act charged, and the motive evidence is admitted to overcome the denial. The decisions of other federal appellate courts clearly establish that motive, while not usually an element of a claim, charge or defense, can be important — sometimes critical —

evidence to support a claim that a person acted in accord with his or her motive. These decisions are all inconsistent with the decision of the court of appeals in this case. *See, e.g., United States v. Contenti*, 735 F.2d 628, 632 (1st Cir. 1984), (holding that the loans made to a defendant before and after a fire were relevant to show his financial position and a motive to burn down his business in order to seek insurance proceeds); *United States v. Harvey*, 547 F.2d 720, 722 (2d Cir. 1976) (reversing a conviction for bank robbery on the ground that a key prosecution identification witness was improperly protected against evidence that the witness once had accused the appellant of fathering a child of hers, as the court emphasized that "bias of a witness is not a collateral issue and extrinsic evidence is admissible to prove that a witness has a motive to testify falsely . . ."); *Gastineau v. Fleet Mtge. Corp.*, 137 F.3d 490, 495 (7th Cir. 1998) (evidence admissible to show that the plaintiff "has a common scheme or plan in disputes with his former employers — creating false documents in anticipation of litigation," and also to show his "motive in creating false documents as revenge against former employers and the hope of monetary gain."); *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1104 (8th Cir. 1988) ("[e]vidence of prior acts of discrimination is relevant to an employer's motive in discharging a plaintiff, even where this evidence is not extensive enough to establish discriminatory animus by itself"); *Heyne v. Caruso*, 69 F.3d 1475, 1480 (9th Cir. 1995) (reversing district court's exclusion of testimony regarding the defendant's harassment of employees other than the plaintiff in a quid pro quo sexual harassment action and finding that the evidence was probative of the employer's motive or intent in discharging the plaintiff, and its probative value was not significantly outweighed by its prejudicial effect).

The panel opinion,[6] Appendix A, at p. 5a, is the first decision anywhere in the United States of which Petitioners are aware to hold that motive is *never* relevant to prove action. The issue the panel was addressing was whether Petitioners had the right to show that Respondent, who denied exercising control of safety on the construction project where David Pogue fell, had a motive to exercise control. Petitioners had evidence that Respondent had a substantial financial incentive to exercise the very control that Respondent denied that it exercised. But, the panel reasoned that "[m]otivation and control of safety, however, are two entirely different things. While motivation to avoid financial liability may prompt one to undertake to guarantee safety, it is no proof at all that one, in fact, did undertake to do so." *Id.* Such reasoning would render motive evidence always inadmissible and flies in the face of hundreds if not thousands of decisions finding that motive evidence is admissible to explain behavior.

On August 22, 2000, the Eighth Circuit declared its own local rule forbidding the citation of unpublished opinions unconstitutional. *Anastasoff v. United States*, No. 99-3917EM, (August 22, 2000), 2000 U.S. App., LEXIS 21179. The court reasoned that by permitting it to avoid the precedential effect of its own decisions, the local rule was violative of Article III of the Constitution of the United States "because it purports to confer on the federal courts a power that goes beyond the 'judicial.' " *Id.* at 3-4.

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6. Due to illness, a member of the three-judge panel did not participate in the decision. The decision was rendered by a quorum of the panel pursuant to 28 U.S.C. § 46(d).

Petitioners are extremely aware of the workload of the federal appellate courts, and understand the forces that impel the increasing use of "unpublished" opinions. Petitioners respectfully suggest, however, that any opinion, published or unpublished, that denies a litigant the benefit of the rule of law undermines the integrity of the federal court system and belies the fundamental principle of justice that all citizens have an equal opportunity to be fairly heard by federal appellate courts and to have the rules of evidence fairly applied to them.

As Circuit Judge Arnold so eloquently wrote in *Anastasoff* regarding the practicalities of "unpublished" opinions:

> It is often said among judges that the volume of appeals is so high that it is simply unrealistic to ascribe precedential value to every decision. We do not have time to do a decent enough job, the argument runs, when put in plain language, to justify treating every opinion as a precedent. If this is true, the judicial system is indeed in serious trouble, but the remedy is not to create an underground body of law good for one place and time only. The remedy, instead, is to create enough judgeships to handle the volume, or if that is not practical, for each judge to take enough time to do a competent job with each case. If this means that backlogs will grow, the price must still be paid. At bottom, rules like Rule 28A(i) assert that courts have the following power: to choose for themselves, form among all the cases they decide, those that they will follow in the future, and those that they need not. Indeed, some forms of the non-

publication rule even forbid citations. Those courts are saying to the bar: "We may have decided this question the opposite way yesterday, but this does not bind us today, and what's more, you cannot even tell us what we did yesterday." As we have tried to explain in this opinion, such a statement exceeds the judicial power, which is based on reason, not fiat. *Id.* at 20-21.

CONCLUSION

This case presents questions of exceptional importance-whether a federal district court and a federal court of appeals in a civil action should be permitted to ignore the mandates of this Court as promulgated in *Daubert* and *Kumho Tire* to exclude expert testimony offered by a defendant in a civil case where the defendant offered no basis in science or experience to support the expert's testimony and similar testimony offered by a plaintiff's expert would certainly have been excluded; and whether it is an abuse of discretion for a circuit court to fashion a rule of law in this case that is inconsistent with its own prior decisions, decisions of other circuits, decisions of this Court and common sense, and seek to avoid subsequent appellate scrutiny by ordering that its opinion not be published.

Accordingly, Petitioners respectfully request that the Court grant their petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED APRIL 28, 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-9049

D.C. Docket No. 93-00258-4-CV-HLM

DAVID KEITH POGUE,
DENISE POGUE,

Plaintiffs-Appellants,
Cross-Appellees,

versus

OGLETHORPE POWER CORP.,

Defendant-Appellee,
Cross-Appellant.

Appeals from the United States District Court
for the Northern District of Georgia

(April 28, 2000)

Before CARNES, Circuit Judge, and HILL, Senior Circuit Judge, and HOEVELER*, Senior District Judge.

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* Judge Hoeveler did not participate in this decision due to illness. This decision is rendered by a quorum. 28 U.S.C. § 46(d).

Appendix A

HILL, Senior Circuit Judge:

David and Denise Pogue brought this negligence action against Oglethorpe Power Corporation after David Pogue was seriously injured while working on its construction site. The jury returned a verdict for the defendant and the Pogues brought this appeal. For the following reasons, we affirm the jury's verdict.

I.

Oglethorpe Power Corporation ("Oglethorpe") was the majority owner of a construction project known as the "Rocky Mountain Project" in Floyd County, Georgia at the time of David Pogue's injury. The principal contractor on the project was Power Plant Constructors ("PPC"). At the time Oglethorpe contracted with PPC, Oglethorpe agreed to provide a "wrap-up" insurance policy to provide workers' compensation insurance coverage to all contractors and subcontractors on the construction site.

David Pogue began working for PPC in October 1991 as a cement finisher. On June 5, 1992, Pogue stepped on a piece of plywood which gave way. He fell forty-eight feet, sustaining serious and disabling injuries.[1] Pogue sued Oglethorpe for both negligent failure to provide a safe place to work and negligent inspection. Pogue's wife sued for loss of consortium. A jury, however, found for Oglethorpe on all counts.

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1. Pogue is currently receiving workers' compensation benefits pursuant to his employment with PPC.

Appendix A

II.

The Pogues raise the following issues on appeal. First, they argue that the district court erred in excluding evidence of Oglethorpe's wrap-up insurance policy. They contend that this evidence was admissible under Rule 411, Fed. R. Evid., to show Oglethorpe's control over safety at the work site. Second, they contend that the district court erred when it admitted the results of a urine drug screen performed on Pogue when he was admitted to the hospital because it was neither relevant nor reliable. The district court also erred, according to the Pogues, when it admitted testimony on the issue of safety violations at the site when there was no showing that this evidence was either relevant or reliable.[2] We shall consider each of these assignments of error in turn.

III.

A. *Evidence of Insurance*

First, the Pogues contend that the district court should have allowed them to introduce evidence that Oglethorpe purchased the wrap-up insurance policy providing workers' compensation benefits for the workers at the project. The district court excluded this evidence because it did not prove any matter of consequence in the action because Oglethorpe did not deny that it exercised control over the site. The Pogues, however, argue that this evidence was essential in order for them to show that Oglethorpe exercised control

2. We find no merit in the Pogues' final contention that the district court erred in its instructions to the jury.

over *safety* at the project site. They assert that the jury found for Oglethorpe because it believed that Oglethorpe was not in charge of safety at the construction site when, according to the Pogues, it was.

In order to establish that it was not liable for negligent oversight of the construction project, Oglethorpe introduced the construction contract it entered with PPC. This contract provided:

> The Owner reserves the right, but assumes no duty, to establish and enforce site rules, and to change the same from time to time, for the protection of persons and property, with which the Contractor shall comply, and to review efficiency of all protective measures taken by the Contractor. Nevertheless, the exercise of or failure to exercise any or all of these duties and responsibilities under the Contract are the responsibility of the Contractor, and the Owner does not thereby assume, nor shall be considered to have assumed, any such duties or responsibilities of the Contractor.

Oglethorpe relied on this language to prove that it was not responsible for safety at the construction site. The Pogues contended, however, that, notwithstanding this language, Oglethorpe undertook to control safety at the site because they had a quarter of a million dollars exposure under the wrap-up insurance policy. The Pogues argued that they could establish Oglethorpe's *motivation* to control safety only through the introduction of the insurance policy.

Appendix A

At the outset, we note that evidence of insurance is admissible to prove ownership or control, subject to Rule 403's balancing test to determine whether the probative value of the evidence outweighs its prejudicial effect. Rule 411, Fed. R. Evid. On the other hand, it is not at all clear to us how the proffered evidence of the wrap-up insurance policy was either relevant to or probative on the issue of control. The Pogues assert that because Oglethorpe had substantial exposure under the policy, it was *motivated* to exercise *control* over safety at the site. Motivation and control of safety, however, are two entirely different things. While motivation to avoid financial liability may prompt one to undertake to guarantee safety, it is no proof at all that one, in fact, did undertake to do so. Introduction of facts showing that Oglethorpe did things to guarantee safety or assumed responsibility for guaranteeing safety at the site was entirely admissible at this trial. Indeed, the Pogues introduced substantial evidence on the issue of control, including that Oglethorpe hired safety inspectors and that these inspectors had the authority to stop work when they saw danger and to direct contractors to do things to conform to Oglethorpe's safety requirements. This evidence would have been sufficient to support a jury's verdict, had they so found, that Oglethorpe was liable for negligent failure to provide a safe place to work.

The introduction of the wrap-up policy was not essential, if helpful at all, to proving that Oglethorpe undertook, if indeed it did, to guarantee safety at the construction site. Although it may have been relevant on the issue of Oglethorpe's motivation to avoid financial liability, we agree with the district judge that the introduction of the wrap-up

policy would have "put[ ] insurance all over this case," and "the prejudicial effect far outweighs its relevance." Therefore, the district court did not abuse its discretion in disallowing it. *See General Elec. Co. v. Joiner*, 522 U.S. 136 (1997).

B. *Evidence of Drug Screen*

David Pogue tested positive for marijuana in a drug screen performed at the hospital where he was taken immediately after his fall. The screen showed that he had at least 25 nanograms per milliliter of THC, the active ingredient in marijuana, in his body at the time of the test. These results were admitted into evidence over the Pogues' objection. They argued that there was no showing that this evidence was either relevant or reliable.

Oglethorpe raised as an affirmative defense the issue of David Pogue's contributory negligence, maintaining that he failed to exercise due care because he was impaired by drug use on the day of his accident. It was permitted to introduce the results of the drug screen as probative on this issue. The Pogues objected, arguing that the mere presence of THC in David Pogue's urine on the day of the accident is not probative of impairment. They also contend that there was no showing that the blood test was reliable. They conclude that the admission of the results of the test was an abuse of the district court's discretion.

We disagree. Extrinsic evidence of impairment — the drug screen results — is relevant where contributory negligence is one of the ultimate questions before the jury. *Ballou v.*

Henri Studios, Inc., 656 F.2d 1147, 1155 (5th Cir. 1981). While the results did not require the jury to find that Pogue was impaired at the time of his fall, the positive drug screen was some evidence from which the jury would have been entitled to infer that he was. *See Romine v. Parman*, 831 F.2d 944 (10th Cir. 1987). Additionally, the Pogues were entitled to cross-examine and establish, as they did, that there are many reasons *not* to draw such an inference. The issue is then left to the judgment of the jury on the facts of this case. That is how we do it, and that is how it was done in this case. *See Ballou*, 656 F.2d at 1154 (district court determines the probative value of the test results if true, and leaves to the jury the difficult choice of whether to credit the evidence).

The Pogues also argue that the district court did not apply the *Daubert* test to determine whether the urinalysis was sufficiently reliable to be admitted. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The record shows, however, that the court held a hearing on July 15, 1998 at which the Pogues' motion to exclude the drug screen results was considered and denied. The district court held that the results of such a screen were admissible so long as there was an adequate chain of custody. Inasmuch as the Pogues conceded that the results were the hospital's business record and authentic, the court admitted them.

We concur in this result. Absent any specific evidence of error in the urine testing that would overcome the hospital records' presumption of trustworthiness, the results of the urine test recorded in his hospital records are admissible. Speculation about possible errors by the hospital in carrying out the test may be appropriate cross-examination, but it does

not render the record inadmissible. Such questions go to the weight of the evidence, not its admissibility. *Ballou*, 656 F.2d at 1155 (so long as court is persuaded that as a matter of normal likelihood the evidence has been adequately safeguarded, issues of alteration, contamination or adulteration are for the jury).

Nor were these results inadmissible because they were highly prejudicial to Pogue. The test under Rule 403 is not whether the proffered evidence is prejudicial, but rather whether it is *unfairly* prejudicial. *Id.* As we have previously noted, "[v]irtually all evidence is prejudicial or it isn't material." *Dollar v. Long Mfg., N.C., Inc.*, 561 F.2d 613, 618 (5th Cir. 1977). To be unfairly prejudicial, evidence must tend to suggest a decision on an improper ground. *Ballou*, 656 F.2d at 1155. Evidence tending to show impairment, however, is not unfair because impairment is unquestionably a legitimate reason for a jury to find contributory negligence. *Id.* Admission of the drug screen results was not an abuse of discretion.

C. *Expert Testimony*

We also reject the Pogues' contention that the district court abused its discretion in permitting Girard Turner, a former inspector for the Office of Safety and Health Administration (OSHA) to testify that PPC, not Oglethorpe, was responsible for OSHA compliance at the construction site. We agree with the district court that this evidence was relevant to the issue of control over safety which the Pogues contend is the central issue in the case. Under Rule 702, testimony which has a valid connection to the pertinent

inquiry is admissible if it will assist the jury in deciding the case. *Kumbo Tire Co. Ltd. v. Carmichael*, 119 S. Ct. 1167, 1175 (1999) (citing *Daubert*, 509 U.S. at 592). Vigorous cross-examination is the traditional and appropriate means of attacking such testimony, not its exclusion. The admission of this evidence was not an abuse of its discretion.[3]

III.

We hold that the district court did not abuse its discretion in its evidentiary rulings in this case. Finding no other reversible error, we AFFIRM the judgment.

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3. In view of our affirmance of the jury's verdict, we do not consider the issues raised by Oglethorpe on cross-appeal.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ROME DIVISION DENYING PLAINTIFFS' MOTION IN LIMINE RE EVIDENCE OF "WRAP-UP" INSURANCE PROGRAM DATED JULY 13, 1998 AND FILED JULY 14, 1998

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

CIVIL ACTION FILE NO. 4:93-CV-0258-HLM

David Keith Pogue and Denise Pogue,

PLAINTIFFS,

v.

Oglethorpe Power Corp. and Rome Employment Services, Inc.,

DEFENDANTS.

ORDER

This is a personal injury case in which Plaintiffs contend that Plaintiff David Pogue suffered bodily injury as a result of Defendants' negligence. The case is before the Court on Plaintiffs, Motion in Limine Re: Evidence of "Wrap-Up" Insurance Program [71].

Appendix B

Federal Rule of Evidence 411 provides:

> Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully. This rule does not require the exclusion of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

Plaintiffs urge the Court to permit Plaintiffs to introduce evidence that Defendant obtained a "wrap-up" insurance policy not for the purpose of showing that Defendant acted negligently or wrongfully, "but for the limited purposes of establishing, among other things, ownership, control of safety and/or responsibility for the safety program and inspection on the Rocky Mountain Project, and the bias and prejudice of certain witnesses who may be called . . . ." (Pls.' Mot. in Limine at 2.)

Ownership and control of the property on which the accident allegedly occurred is not an issue in this case. Both parties stated to the Court in the Pre-Trial Conference of June 16, 1998, that Defendant would not deny ownership or control of the premises. Furthermore, Defendant stipulates that the employees of Rome Employment Services were acting on Defendant's behalf, that is, that the employees were agents acting within the scope of their employment for the purposes of this case. (Stipulation by and Between the Parties Regarding the Employees of Rome Employment Services, Inc. on the Rocky Mountain Project.) Plaintiffs' first

proffered reason for seeking admission of evidence of a wrap-up insurance policy thus is without merit.

Plaintiffs next contend that the evidence should be admitted to show bias of witnesses that may be called. The fact that Plaintiffs speculate that a witness may be called who may be impeached by evidence that Defendant obtained a wrap-up insurance policy simply is not a valid reason for the Court to grant a motion in limine because it is too speculative. If indeed Plaintiffs encounter a witness at trial who legitimately can be impeached by a showing that Defendant obtained a wrap-up insurance policy, then the Court may admit the evidence at that time. In the meantime, however, Plaintiffs have shown no legitimate reason for the Court to admit evidence that Defendant obtained a wrap-up insurance policy. Consequently, the Court denies Plaintiffs' Motion in Limine.

IT IS SO ORDERED, this the 13th day of July, 1998.

s/ Harold S. Murphy
UNITED STATES DISTRICT
JUDGE

APPENDIX C — PER CURIAM ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JUNE 30, 2000

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 98-9049-JJ

DAVID KEITH POGUE,
DENISE POGUE,

Plaintiffs-Appellants,
Cross-Appellees,

versus

OGLETHORPE POWER CORP.,

Defendant-Appellee,
Cross-Appellant.

On Appeal from the United States District Court for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, __ F.2d __).

Before: CARNES, Circuit Judge, and HILL, Senior Circuit Judge, and HOEVELER*, Senior District Judge.

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* Judge Hoeveler did not participate in this decision due to illness. This decision is rendered by a quorum. 28 U.S.C. § 46(d).

Appendix C

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ James C. Hill
SENIOR UNITED STATES CIRCUIT JUDGE

Supreme Court, U.S.
FILED
OCT 19 2000
OFFICE OF THE CLERK

No. 00-423

IN THE

Supreme Court of the United States

DAVID KEITH POGUE and DENISE POGUE,

Petitioners,

v.

OGLETHORPE POWER CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Eleventh Circuit erred in holding that the District Court did not abuse its discretion by allowing expert testimony on Respondent's affirmative defense of contributory negligence where the expert's testimony was based on a reliable foundation, was relevant, and the court performed the required gatekeeping function?

2. Whether the Court of Appeals for the Eleventh Circuit erred in holding that the District Court did not abuse its discretion by refusing to admit evidence of a wrap-up insurance policy?

CORPORATE DISCLOSURE STATEMENT

Oglethorpe Power Corporation is a non-profit corporation which is equally owned by thirty-nine cooperatives. There is no parent and no publicly held company owns 10% or more of the stock of the Respondent.

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II. The Petition For Writ Of Certiorari Should Be Denied, Because The Eleventh Circuit Did Not Err In Affirming The District Court's Ruling Refusing To Admit Evidence Of A Wrap-up Insurance Policy, And The Unpublished Opinion Of The Eleventh Circuit Does Not Deny Petitioners The Benefit Of The Rule Of Law, Because The Court's Ruling Was Based Upon Sound Law And Does Not Attempt To Avoid Precedential Effect. 7

A. The Eleventh Circuit did not err in affirming the trial court's ruling refusing to admit evidence of a wrap-up insurance policy. 7

B. The unpublished opinion of the Eleventh Circuit does not deny Petitioners the benefit of the rule of law, because the court's ruling was based upon sound law and does not attempt to avoid precedential effect. 9

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Cases:

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Kumho Tire Company, Ltd., et al. v. Carmichael, etc. et al., 526 U.S. 137, 119 S. Ct. 1167 (1998) 3, 11

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STATEMENT OF THE CASE

Respondent Oglethorpe Power Corporation accepts the facts as outlined by Petitioners, with the following additions:

Prior to the commencement of trial, the parties engaged in rigorous written and oral argument before the court on the issues of admissibility of Petitioner David Pogue's drug screen results and the introduction of the wrap-up insurance policy. Tr. at 30-37. After consideration of the arguments presented, the Court allowed evidence of David Pogue's impairment on the issue of contributory negligence and excluded the admission of the wrap-up insurance policy. Tr. at 30-37, 867, 902-903. The United States Court of Appeals for the Eleventh Circuit found that the district court did not abuse its discretion by refusing to admit the wrap-up insurance policy into evidence and did not abuse its discretion in admitting the positive drug screen results. Pet., App. A at 9a.

The issues presented to the Eleventh Circuit and those before this Honorable Court both involve an abuse of discretion standard. Petitioners have repeatedly ignored this liberal standard. Instead, Petitioners misstate the facts, expressing that neither the Eleventh Circuit nor the District Court made any inquiry whatsoever as to the drug screen results and the insurance policy. The Eleventh Circuit's ruling was proper in all respects. Respondent respectfully requests this Honorable Court to deny the Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I. THE RECORD AND THE DECISION BELOW CLEARLY SHOW THAT THE EXPERT'S TESTIMONY WAS BASED ON A RELIABLE FOUNDATION AND WAS RELEVANT, THE COURT PERFORMED THE REQUIRED GATEKEEPING FUNCTION, AND THE ELEVENTH CIRCUIT DID NOT ERR IN AFFIRMING THE DISTRICT COURT'S RULING.

The decision whether to admit evidence of consumption or use of potentially intoxicating drugs and beverages is a matter which is dedicated to the sound discretion of the trial court. Fed. R. Evid. 403, 702, 104; *Ballou v. Henry Studios*, 656 F.2d 1147 (5th Cir. 1981). The same is true of any review of the court's decision under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993). The Petitioners did not demonstrate to the Eleventh Circuit that the district judge abused his discretion in admitting this evidence.

The Eleventh Circuit thoroughly explained the relevance and admissibility of Mr. Pogue's positive drug screen results. The Eleventh Circuit stated that

> [e]vidence of impairment — the drug screen results — is relevant where contributory negligence is one of the ultimate questions before the jury. While the results did not require the jury to find that Pogue was impaired at the time of his fall, the positive drug screen was some evidence from which the jury would have been entitled to infer that he was. Additionally, the [Petitioners] were entitled to cross-examine and establish, as they did, that there are many reasons *not* to draw

> such an inference. The issue is then left to the judgment of the jury on the facts of this case. That is how we do it, and that is how it was done in this case.

Pet., App. A at 6a-7a (emphasis original).

Daubert provides a two part test for determining whether to admit expert testimony. 509 U.S. at 580. First, the trial judge must ensure that the expert's testimony rests on a reliable foundation. *Id.* Second, the trial judge must ensure that the expert's testimony is relevant. *Id.* This Court explained that the first inquiry is flexible and that its focus should not be "on the conclusions that they generate." *Id.* Further, "cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof, rather than wholesale exclusion . . . is the appropriate means by which evidence based on valid principles may be challenged." *Id.*

Next, the expert's testimony must be relevant. *Id.* The testimony regarding the drug screen results assisted the jury both in understanding the evidence and in determining a fact in issue. The Eleventh Circuit clearly explained the relevance of the results from the drug screen in this case and the method of dealing with such evidence. Pet., App. A at 6a-7a.

In *Kumho Tire Company, Ltd., et al. v. Carmichael, etc. et al.*, this Court further explained the necessary inquiries where expert testimony is involved. 526 U.S. 137, 119 S. Ct. 1167 (1998). In *Kumho*, this Court stated that under *Daubert*, the Rule 702 inquiry is flexible and the *Daubert* factors are not conclusive. 526 U.S. 137, 138. Moreover,

"whether *Daubert's* specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude." *Id.* at 139. An expert's testimony is given "latitude unavailable to other witnesses on the assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline." *Id.* at 138. Finally, as was done by the Eleventh Circuit in this case, an abuse of discretion standard is applied on the review of a trial court's determination of whether to admit expert testimony. *Id.* at 138-139.

A. The expert's testimony was relevant and based on a reliable foundation.

Petitioner David Pogue tested positive for marijuana in a drug screen performed at Floyd Medical Center where he was taken immediately after he fell through the opening in the floor. The drug screen showed that Pogue had at least 25 nanograms per milliliter of THC in his body at the time of the test. Tr. at 911. THC is the active ingredient in marijuana. Tr. at 944. Respondent alleged contributory negligence as an affirmative defense. Tr. at 19-21. Petitioners defended by alleging that Petitioner David Pogue tested positive for THC due to "passive inhalation." Tr. at 411-412.

Respondent offered expert testimony from Dr. Horton McCurdy, a forensic pathologist with the Georgia State Crime Lab. Tr. at 939. Dr. McCurdy was retained by Respondent through his private consulting firm, Toxicology Consultants, Incorporated. Tr. at 939. Dr. McCurdy testified that the level of THC Mr. Pogue tested positive for is not consistent with "passive inhalation." Tr. at 945-947. Further, Dr. McCurdy explained that to reach

that level of THC by passive smoke alone, the following conditions would have to be satisfied: Mr. Pogue must have spent at least one hour in an automobile with two marijuana smokers, each constantly smoking a marijuana cigarette, with the windows shut and no air conditioning could be in use. Tr. at 946-947. Moreover, the sample must have been collected within six hours of exposure. Tr. at 947. If these severe conditions were met, Dr. McCurdy testified that only one in twenty-four persons would test positive for THC. Tr. at 946. Dr. McCurdy testified that his testimony was based not only on his personal experience as a forensic toxicologist for more than twenty five years, but also on scientific studies which have been reported in scientific literature. Tr. at 939, 946-948.

Accordingly, Dr. McCurdy's testimony regarding the drug screen was based on a reliable foundation and the positive test was relevant to the issue of contributory negligence and Mr. Pogue's drug use on the day of his fall.

B. The District Court performed its gatekeeping function.

The Petitioners argue that the district court abdicated its gatekeeper responsibilities under *Daubert* by allegedly refusing to hold a hearing. It is clear, however, that the court did in fact hold a hearing on July 15, 1998, on the Petitioners' motion and made a preliminary determination on the basis of Federal Rule of Evidence 104(a). Tr. at 30-38. It is unclear whether Petitioners believe that this should have been a full evidentiary hearing or are otherwise dissatisfied. It is irrelevant whether their contention is that an evidentiary hearing should have been held, because Federal Rule of Evidence 104(a) does not require an evidentiary hearing.

In fact, the rule specifically states that the court's "determination is not bound by the rules of evidence except those with respect to privileges." Accordingly, the trial court did not abdicate its responsibility as insisted by the Petitioners.

C. The Eleventh Circuit Court of Appeals did not err in affirming the district court's ruling.

The essence of Petitioners' argument before this Honorable Court is that the evidence should have been excluded under *Daubert*; however, Petitioners cannot show that the trial judge's decision was an abuse of discretion. The Eleventh Circuit has held that while decisions whether to apply *Daubert* are de novo, a court's "decision to exclude particular evidence under *Daubert* [will be reviewed only] for abuse of discretion." *Carmichael v. Samyang*, 131 F.3d 1433 (11th Cir. 1997), (citing *General Electric v. Joiner*, 522 U.S. 136, 139 L. Ed. 2d 508, 118 S. Ct. 512 (1997)). No abuse of this kind can be shown. Therefore, the Petition for a Writ of Certiorari should be denied.

II. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED, BECAUSE THE ELEVENTH CIRCUIT DID NOT ERR IN AFFIRMING THE DISTRICT COURT'S RULING REFUSING TO ADMIT EVIDENCE OF A WRAP-UP INSURANCE POLICY, AND THE UNPUBLISHED OPINION OF THE ELEVENTH CIRCUIT DOES NOT DENY PETITIONERS THE BENEFIT OF THE RULE OF LAW, BECAUSE THE COURT'S RULING WAS BASED UPON SOUND LAW AND DOES NOT ATTEMPT TO AVOID PRECEDENTIAL EFFECT.

A. The Eleventh Circuit did not err in affirming the trial court's ruling refusing to admit evidence of a wrap-up insurance policy.

The trial court's determination to exclude the wrap-up insurance policy was within its sound discretion. The Eleventh Circuit did not err in affirming the trial court's decision. Further, the trial court did not exclude this evidence solely because it was an insurance policy. The trial court made this fact perfectly clear the last time the documents were tendered:

> . . . I'll reiterate what I said the other day. Those two documents ya'll showed me that I would not let in evidence, I've seen nothing that makes them admissible. They're not admissible just because there's some fellow's written a book about wrap-up policies. It's rank hearsay insofar as admissibility's concerned.

Tr. at 867.

Evidence of this wrap-up insurance policy was also inadmissible under Federal Rule of Evidence 411, which states that "evidence that a person was or was not insured against liability is not admissible upon the issue of whether the person acted negligently or otherwise wrongfully." Such evidence is admissible only where it is "offered for another purpose, such as proof of agency, ownership or control or bias or prejudice of a witness." Fed. R. Evid. 411. As the Eleventh Circuit explained, "[t]he district court excluded this evidence because it did not prove any matter of consequence in the action because Oglethorpe did not deny that it exercised control over the site." Pet., App. A at 3a. When this evidence is offered for some other purpose, it may be admitted only after a Federal Rule of Evidence 403 balancing process. The trial court conducted such a balancing test and thoroughly explained its reasons. Tr. at 30-37, 736, 867. It did so both when initially denying the Petitioners' motion in limine regarding the wrap-up policy and during the course of the trial when the request was renewed. Pet., App. B at 10a-11a; Tr. at 736, 867.

The Eleventh Circuit stated that it was entirely admissible for Petitioners to introduce facts which showed that Respondent "did things to guarantee safety or assumed responsibility for guaranteeing safety at the site. . . . Indeed, the [Petitioners] introduced substantial evidence on the issue of control, including that [Respondent] hired safety inspectors and that these inspectors direct contractors to do things to conform to [Respondent's] safety requirements." Pet., App. A at 5a. Moreover, the Eleventh Circuit explained that

> introduction of the wrap-up policy was not essential, if helpful at all, to proving that

> [Respondent] undertook, if indeed it did, to guarantee safety at the construction site. . . . [W]e agree with the district judge that the introduction of the wrap-up policy would have "put [ ] insurance all over this case," and "the prejudicial effect far outweighs its relevance."

Pet., App. A at 5a-6a.

The trial court followed the mandates of Federal Rules of Evidence 411 and 403 and appropriately engaged in a balancing test. The decision of the trial court was not an abuse of discretion. Accordingly, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

B. The unpublished opinion of the Eleventh Circuit does not deny Petitioners the benefit of the rule of law, because the court's ruling was based upon sound law and does not attempt to avoid precedential effect.

The unpublished opinion did not deny Petitioners the benefit of the rule of law, because the court's rule in this case was based upon sound law and did not attempt to avoid precedential effect. Petitioners attempt to persuade this Court that the Eleventh Circuit did not publish its opinion, because it did not want to "acknowledg[e] the error of its ruling" and avoid the precedential effect of its ruling. Pet. at 16. Petitioners' accusation is without merit.

Petitioners' entire appeal seeks review based upon the common abuse of discretion standard. Petitioners support their zealous argument on the importance of precedential rulings by citing solely to *Anastasoff v. United States of America*, which, interestingly, as an Eighth Circuit case has

only persuasive and not precedential value to the Eleventh Circuit. No. 99-3917EM, (August 22, 2000), 2000 U.S. App., LEXIS 21179. Nevertheless, Respondents do not maintain that *Anastasoff* is an erroneous holding, but that it simply is inapplicable to the facts of this case.

The wrap-up insurance policy was not admitted, as both the trial court and the Eleventh Circuit thoroughly explained, for several reasons. First, Petitioners claim that the wrap-up policy was essential to prove Respondent's motive to control safety on the job site. Pet. at 11-13. However, the Eleventh Circuit explained that "[Respondent] did not deny that it exercised control over the site." Pet., App. A at 3a. Ergo, the wrap-up policy was not essential to Petitioners' case. Second, under the Fed. R. Evid. 403 balancing process, it was held that admitting this insurance policy " 'would have 'put[ ] insurance all over this case,' and 'the prejudicial effect far outweighs its relevance.' " Pet., App. A at 5a-6a. Accordingly, the insurance policy was not admitted. Finally, the trial court ruled that the wrap-up insurance policy was "rank hearsay" and was thus inadmissible. Tr. at 867.

The Eleventh Circuit neither erred in its ruling nor attempted to avoid an erroneous ruling by ordering the case be unpublished. The unpublished opinion of the Eleventh Circuit does not suggest that it is somehow a secret attempt to hide a bad rule; that implication by Petitioners is meritless. Petitioners misrepresent the facts of this action and cite to inapplicable case law to suggest that both the trial court and the Eleventh Circuit disregarded the rules of evidence and manufactured an unpublished opinion to avoid "acknowledging the error of its ruling." Pet. at 16. Petitioners' assertion is clearly incorrect. Consequently, the Petition for a Writ of Certiorari should be denied.

CONCLUSION

The issues presented in this case involve whether the Eleventh Circuit, in affirming the jury's verdict, erred in holding that the district judge did not abuse his discretion in admitting the results of a positive drug screen and refusing to admit the wrap-up insurance policy into evidence. The district court and the Eleventh Circuit Court of Appeals clearly followed *Daubert*, *Kumho Tire*, and the Federal Rules of Evidence. Evidence of the unpublished opinion is insignificant to issues before this Court.

For all the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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